No. 96-1149

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

THE TRUSTEES OF TEAMSTERS PENSION TRUST FUND OF PHILADELPHIA AND VICINITY; TEAMSTERS PENSION TRUST FUND OF PHILADELPHIA AND VICINITY AND CHARLES J. SCHAFFER, JR., its administrator and fiduciary,

Petitioners,

v.

FEDERAL EXPRESS CORPORATION;
THE FLYING TIGER LINES, INC.;
WARREN TRANSPORT, INC.;
TIGER INTERNATIONAL, INC.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITIONERS' REPLY BRIEF

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The Brief in Opposition falls flat with the District Court's conclusion that "[a]lthough the parties disagree on the inferences to be drawn from the facts, the basic sequence of events is undisputed." Petition, p. 7a n.1. See also, Petition, p. 23 and cases cited (no deference to inferences). The District Court concluded that "[i]n both *Santa Fe* [*Pacific Corp. v. Central States, S.E. & S.W.A. Pension Fund*, 22 F.3d 725 (7th Cir. 1994)] and this case, the evidence established that an assets sale would have been more profitable to the parent company but for

the potential withdrawal liability." Petition, p. 15a.[1] The court nonetheless confirmed the Nagle award because "the arbitrator correctly relied on *Dorn's Transportation, Inc. v. Teamsters Pension Trust Fund of Philadelphia and Vicinity*, 787 F.2d 897 (3d Cir. 1986)," Petition, p. 13a, and "*Santa Fe* . . . . is not controlling law in this circuit." Petition p. 16a. The Third Circuit endorsed this legal analysis in affirming "essentially for the reasons set forth in the District Court's opinion." Petition, p. 3a.

In more candid comments before oral argument, the Arbitrator conceded as much:

> 1. Tiger's evidence supporting the proposition that sale of Hall's was necessary in order to achieve an ESOP or obtain additional lender support seems rather thin. Moreover, under all the circumstances it seems somewhat implausible that Cronin and Tiger management would not have had greater awareness than has been represented regarding the full significance of Hall's potential MPPAA liability.
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> * * * *
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> 2. . . . The Lafferty memorandum suggests that Cronin had greater concern regarding Hall's MPPAA liability than Cronin has acknowledged, . . .
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> * * * *
>
> 5. Arguably the case can be made that absent MPPAA, Tiger could have done better by liquidating Hall's rather than selling it as a going concern, at

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[1] The District Court noted that a sale of assets under 29 U.S.C. § 1384 would not trigger withdrawal liability—but would leave Tiger with exposure for withdrawal liability for the next five years. Petition, p. 15a, n.5. A sale of assets could offer closure, a definite valuation, a retained minority interest in the new company and everything else cited as reasons for the stock "sale." The stock "sale" was the only vehicle which promised a complete escape from withdrawal liability. This was critical in the face of an expected Hall's bankruptcy and withdrawal in early 1985 and consequent default under the Override Agreement, Petition, pp. 80a, 124a-125a, which Tiger would have to disclose before the public offering in February 1985.

> least under the terms that it did. Once withdrawal liability is taken into account, however, liquidation would seemingly have been foolhardy.

See Petitioner's Reply Brief, Supplemental Appendix, pp. SA-2, SA-3. An individual, faced with an impending judgment and foreclosure, is equally "foolhardy" if he does not sell his home to a relative or friend for $1 with the hope that he may thus avoid foreclosure and perhaps regain the house once the threat has passed. Neither the sale of the home for $1 nor Tiger's gift of Hall's to Bodford at a net cost of over $1 Million in closing expenses makes economic sense for a seller absent a desire to avoid a legal debt obligation. *Santa Fe* correctly concludes that such actions lie within the core definition of fraud.

The arbitrator confirmed all of the "facts" necessary to liability under the test applied by *Santa Fe* and the Fund. He acknowledged that Tiger management was fully aware of withdrawal liability as it had been documented each year by Arthur Andersen, the outside auditor for both Hall's and Tiger, Petition, p. 80a, n. 2. For entirely unexplained reasons, the arbitrator completely omits reference to a May 10, 1984 memo by Robert Harter, the bankruptcy lawyer and legal architect of the Hall's sale for Tiger, which sparked the process by noting a potential foreclosure on Hall's and that "Tiger's exposure results from Hall's $35,000,000 multiemployer pension plan liability."

Tiger admittedly rejected higher offers which did not promise to assume withdrawal liability. It rejected an offer of $15 Million (plus the debt secured in the Bodford gift) for Halls from Bodford in the summer of 1984, Petition, p. 89a. It likewise turned its back on an offer from Whit Lee of $15 Million or more in December 1984, Petition, p. 87a. It instead offered to pay $1 Million in closiing costs to have Bodford take the withdrawal liability off its hands for $1,000, Petition, pp. 88a

(Lee Offer), 89a-90a (ultimate Bodford deal matching Lee proposal for withdrawal liability assumption). This price makes no sense unless the existing equity in Hall's of $28 Million or more, see, Petition, pp. 86a, 132a, n. 14 & 53a, was more than offset by an expected addition of a current withdrawal liability debt to the balance sheet.

The arbitrator expressly confirmed the Fund's central conclusion that the "sale" was primarily done to enhance Tiger's position in an expected Hall's bankruptcy.

> . . . the $1,000 received from Bodford is clearly not the significant consideration for this transaction. Rather, the real consideration included the secured commitments to pay the $10.5 Million owed by Hall's to Tiger. . .

Petition, p. 131a.[2] The security interest (on a reduced debt) offered no value to Tiger unless it believed that Halls faced imminent bankruptcy and withdrawal liability.

The security interests which Tiger and the banks received in the Bodford gift actually crushed Hall's as they prevented Hall's from obtaining any further credit or financing, Petition, p. 95a. There is obvious pretext when a company asserts a desire to continue operations and that a need for cash was the driving force in a transaction but takes a security interest which denies further cash to the company in need.

The question on undisputed facts thus is simply whether a transaction which makes no economic sense for the seller

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[2] The arbitrator mentions the retained 25% interest, Petition, p. 131a, but omits the Tiger Form 10-K with an immediate write-off of the retained interest as worthless. Harter, Tiger's counsel, admitted that the retained interest was an embarrassing mistake which left Tiger open to the "gun to its head" of withdrawal liability in Bodford's redemption ploy. The 75% ownership level meant that other companies owned by the buyer would not assume Hall's withdrawal liability. See 26 C.F.R. § 1.414(c)-2(b)(2), (c) (80% common control required).

without avoidance of withdrawal liability runs afoul of 29 U.S.C. § 1392(c). *Santa Fe,* as well as *Banner Industries, Inc. -and- Central States, S.E. & S.W.A. Pension Fund,* 11 Employee Benefits Cas (BNA) 1149 (Graham, Arb. 1989) and *The Sherwin-Williams Company -and- New York State Teamsters Conf. Pension and Retirement Fund,* 17 Employee Benefits Cas. (BNA) 2725 (Gertner, Arb. 1994), have concluded that the Fund applied the correct standard to find liability. Arbitrator Nagle and the Third Circuit, through *Dorn's Transportation* and this case, have applied an entirely different and imposible standard which precludes liability if a company, per *Banner,* 11 E.B.C. at 1181, ". . . rid[s] itself of a failing subsidiary by propping it for some, unspecified, length of time as long as it can subsequently demonstrate that the subsidiary had some possibility of survival."

CONCLUSION

The Court should grant *certiorari* to resolve the conflict in the circuits and protect the nation's pension system.

Respectfully submitted,

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